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Wishlab 90, LLC

10
11 UNITED STATES DISTRICT COURT FOR THE
12 CENTRAL DISTRICT OF CALIFORNIA

13 In re: NAMCO CAPITAL GROUP,
14 INC., a California corporation,

15 Debtor.

16
17
18 BRADLEY D. SHARP, solely in his
19 capacity as Chapter 11 Trustee of
20 NAMCO CAPITAL GROUP, INC.,

21 Plaintiff,

22 vs.

23 MOUSA NAMVAR, et al.,

24 Defendants.

Case No.: 2:11-cv-05320-GAF

Bankr. Case No.: 2:08-bk-32333-BR
Bankr. Adv. Proc. No.: 2:10-ap-02945-BR

Chapter 11

**NOTICE OF MOTION AND MOTION
FOR AN ORDER:**

**(A) LIMITING DAVID JUDD AND
BERKELEY RESEARCH GROUP'S
TESTIMONY ON THE MONETARY
CLAIMS AND DAMAGES ALLEGED
BY PLAINTIFF BRADLEY D.
SHARP, CHAPTER 11 TRUSTEE OF
NAMCO CAPITAL GROUP, INC TO
REBUTTAL EXPERT TESTIMONY
LIMITED IN SCOPE TO THE
TESTIMONY ACTUALLY GIVEN
AT TRIAL BY THE MOUSA
DEFENDANTS' FORENSIC
ACCOUNTING EXPERT; AND**

**(B) EXCLUDING BOTH EXPERT
AND PURPORTED PERCIPIENT
WITNESS TESTIMONY FROM MR.
JUDD AND BERKELEY RESEARCH
GROUP ON THE MONETARY
CLAIMS AND DAMAGES ALLEGED**

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**BY PLAINTIFF DURING
PLAINTIFF'S CASE-IN-CHIEF**

**BY DEFENDANTS MOUSA
NAMVAR, MAGDIEL, LLC, NAMCO
8, LLC, WISHLAB 90, LLC,
BUNHERST, LLC, AND DGADE OF
DELAWARE, LLC; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Request for Judicial Notice and Engel, Werderitch, and Resser Declarations filed herewith]

Date: August 19, 2013
Time: 9:30 a.m.
Place: Courtroom 740

Complaint Filed: October 26, 2010
Trial Date: October 29, 2013

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 19, 2013 at 9:30 a.m., or as soon thereafter as the parties may be heard, in Courtroom 740 of the above-entitled Court, located at 255 East Temple St., Los Angeles, California 90012, Defendants Mousa Namvar, Magdiel, LLC, DGADE of Delaware, LLC, Namco 8, LLC, Bunherst, LLC, and Wishlab 90, LLC (collectively, "Mousa Defendants") will and hereby do move the Court for an Order:

(a) Limiting David Judd and Berkeley Research Group's ("BRG's") testimony on the monetary claims and damages alleged by Plaintiff Bradley D. Sharp, Chapter 11 Trustee of Namco Capital Group, Inc. ("Plaintiff") to rebuttal expert testimony limited in scope to the testimony actually given at trial by the Mousa Defendants' forensic accounting expert; and

(b) Excluding both expert and purported percipient witness testimony from Mr. Judd and BRG on the monetary claims and damages alleged by Plaintiff during Plaintiff's case-in-chief.

1 This Motion is made on the grounds that Plaintiff's damages analysis was
2 performed by a designated forensic accounting expert, David Judd (and his company,
3 BRG), who were not disclosed by Plaintiff during Plaintiff's initial expert disclosures,
4 and were disclosed only in rebuttal to the Mousa Defendants' forensic accounting
5 expert's more limited opinions, all causing great prejudice to the Mousa Defendants.
6 *See, Fed. R. Civ. Proc. 26(a)(2)(D)(ii); Goodman v. Staples The Office Superstore,*
7 *LLC* (9th Cir. 2011) 644 F.3d 817, 826-27 (affirming exclusion of rebuttal expert
8 witnesses during plaintiff's case-in-chief); *Lindner v. Meadow Gold Dairies, Inc.*, 249
9 F.R.D. 625, 636 (D. Ha. 2008) (where "rebuttal" was actually "of a direct nature" to a
10 "central factual issue" in the case, the court held that the expert should have been
11 disclosed and a report produced within the time provided for initial reports).

12 This Motion is based upon this Notice of Motion and Motion, the attached
13 Memorandum of Points and Authorities, the accompanying Request for Judicial
14 Notice and Declarations of Jason A. Engel, Lori L. Werderitch, and Bernard M.
15 Resser and exhibits thereto, and all supporting evidence filed concurrently herewith,
16 all of the records, pleadings and papers on file in this action, and upon such further
17 oral or documentary evidence as may be presented at or before the hearing on this
18 Motion.

19 | DATED: July 22, 2013

**GREENBEG GLUSKER FIELDS
CLAMAN & MACHTINGER, L.P.**

21 By: /s/ Brian L. Davidoff.
22 BRIAN L. DAVIDOFF
23 BERNARD M. RESSER
24 Lori L. WERDERITCH
Atorneys for Defendants Mousa Namvar,
Magdiel, LLC, DGADE of Delaware, LLC,
Namco 8, LLC, Bunkerst, LLC, and Wishlab
90, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Either by omission or design, Plaintiff Bradley D. Sharp's, Chapter 11 Trustee of Namco Capital Group, Inc. ("Plaintiff") designated David Judd a forensic accounting expert on damages and all "other financial-related allegations at issue in the adversary proceeding" only at the time of rebuttal. This Trojan horse, whether or not intentional, causes substantial prejudice to Defendants Mousa Namvar, Magdiel, LLC, DGADE of Delaware, LLC, Namco 8, LLC, Bunherst, LLC, and Wishlab 90, LLC (collectively, the "Mousa Defendants"). The Mousa Defendants have been deprived of the opportunity to respond to the delayed expert damages analysis, by rebuttal or otherwise. The Mousa Defendants' trial preparation to date, including the report of their own expert witness, is understandably predicated on the timely disclosures made by Plaintiff. After incurring great expense to prepare their defense for the impending trial, Plaintiff pulled a "bait and switch" and turned the expert disclosure process on its head, requiring the Mousa Defendants to try to catch up and change course at the eleventh hour.

Plaintiff has not played by the rules. The express function of rebuttal experts and rebuttal reports is to rebut or contradict the testimony of opposing experts. Rebuttal reports cannot be used to bolster or support direct testimony; nor can rebuttal experts be used to fill holes in a case-in-chief. Plaintiff offers David Judd only as a “rebuttal” expert on damages, so David Judd’s damages analysis should be limited in scope to rebutting the Mousa Defendants forensic accounting expert’s testimony. The report that was not disclosed as part of Plaintiff’s case-in-chief (and any predecessors or permutations) should not be permitted in Plaintiff’s case-in-chief. Plaintiff’s delayed disclosure causes severe prejudice to the Mousa Defendants’ defense.

Accordingly, the Mousa Defendants move for an order:

(a) Limiting David Judd and BRG's testimony on the monetary claims and damages alleged by Plaintiff to rebuttal expert testimony limited in scope to the

1 testimony actually given at trial by the Mousa Defendants' forensic accounting expert;
 2 and

3 (b) Excluding both expert and purported percipient witness testimony from
 4 Mr. Judd and BRG on the monetary claims and damages alleged by Plaintiff during
 5 Plaintiff's case-in-chief.

6 **II. FACTUAL SUMMARY**

7 **A. Prior Proceedings.**

8 Namco Capital Group, Inc. ("Namco") entered bankruptcy via an involuntary
 9 petition on December 22, 2008. Soon thereafter, plaintiff Bradley D. Sharp (the
 10 "Trustee" or "Plaintiff") was appointed as Chapter 11 Trustee of Namco.

11 The Trustee spent more than two years and many millions of dollars (including
 12 fees paid to forensic accountants such as Mr. Judd and BRG) investigating the
 13 collapse of Namco and pursuing alleged creditors to recoup Namco losses. As part of
 14 that effort, the Trustee retained BRG as forensic accountants and later filed the First
 15 Amended Complaint ("FAC") herein based on BRG's analysis alleging claims against
 16 the Mousa Defendants. Plaintiff also alleges Mousa Defendants are alter-egos of one
 17 another, and are responsible for damages incurred by Namco in connection with
 18 various real estate deals and monetary transfers. The FAC purports to hold all of the
 19 Mousa Defendants liable for a series of transfers from Namco on a "one for all and all
 20 for one" alter-ego theory. The FAC however is bereft of the detail necessary to show
 21 how and why the Mousa Defendants are allegedly liable. (See Request for Judicial
 22 Notice ("RJN") filed concurrently herewith at ¶1.)

23 Accordingly, on March 28, 2011, while this litigation was still pending with the
 24 United States Bankruptcy Court, the Mousa Defendants filed a Motion to Dismiss to
 25 Pursuant to FRBP 12(b)(6) (the "Motion to Dismiss"). (RJN ¶2.) The Motion to
 26 Dismiss complained that Plaintiff did not adequately provide detail of the damages
 27 sought, *e.g.*, as to the Fourth and Eleventh Causes of Action. (*Id.* at pp. 17-24.)
 28 While the Motion to Dismiss was ultimately denied, the Court citing the availability

1 of pretrial disclosures and discovery, Plaintiff was on notice of the FAC's failure to
 2 identify the basis for the money and damages sought from Defendants.

3 **B. Appointment of LECG, LLC and BRG.**

4 In July 2009, the Bankruptcy Court appointed LECG, LLC (and then Director
 5 David Judd) as accountant and financial consultant to the Trustee. (RJN ¶3.) BRG
 6 (and current Director David Judd) is the successor accountant and financial consultant
 7 to LECG LLC. (RJN ¶5; *see also* Exhibits C and I to accompanying Declaration of
 8 Lori L. Werderitch ("Werderitch Dec.") ¶¶5 and 11 at p. 2.)

9 **C. The Court's Scheduling Order Regarding Expert Disclosures.**

10 The Court issued its Rule 16 Scheduling Order on June 25, 2012 (RJN ¶4),
 11 providing initial expert disclosures to be due 70 days prior to the discovery cutoff, or
 12 May 17, 2013. (*Id.* at p. 2:26-28.) It further provides that rebuttal disclosures be
 13 served thirty (30) days thereafter, or June 17, 2013. (*Id.* at p. 2:28-3:2.)

14 **D. Plaintiff's Expert Disclosures Did Not Include a Damages Analysis.**

15 Pursuant to the Scheduling Order, Plaintiff served his Initial Expert Disclosures
 16 on May 17, 2013. (Exhibit A to Werderitch Dec. ¶3.) Plaintiff identified David Judd
 17 as an expert witness solely on topics related to Namco's insolvency and liquidation
 18 value, serving David Judd's Expert Report on the subject. (Exhibit C to Werderitch
 19 Dec.) Plaintiff did not offer an expert report in support of his claim for money or
 20 damages.¹ (Werderitch Dec. ¶3.)

21 Plaintiff's failure to disclose a damages expert in initial expert disclosures
 22 communicated to the Mousa Defendants that Plaintiff's damages would not be
 23 supported by expert testimony and/or analysis. (Werderitch Dec. ¶3.) The Mousa
 24 Defendants' expert prepared his rebuttal report and his initial report without the
 25 benefit of an expert report from Plaintiff's expert. (*Id.*) The Mousa Defendants
 26 prepared their defense for trial accordingly. (*Id.*)

27
 28 ¹ As used herein, the term "damages" specifically refers to the calculations contained
 within Namco's books and records.

E. The Mousa Defendants' Expert Report As to Namco's Lack of Damages.

On May 17, 2013, the Mousa Defendants also served their expert designation, designating Jason A. Engel. (**Exhibit B** to Werderitch Dec. ¶4.) Mr. Engel was retained by counsel for the Mousa Defendants to investigate various financial allegations made in Plaintiff's FAC against the Mousa Defendants.

Mr. Engel struggled with evaluating how to address the damages sought by Plaintiff because Plaintiff's FAC did not contain a clear basis for the damages and did not seem to square with Namco's books and general ledger. During discovery, Plaintiff produced hundreds of thousands of documents absent any guidance to the Mousa Parties whatsoever as to the identification of those pertaining to damages and/or damages calculations. Only after the meet and confer occurred regarding this motion did Plaintiff's counsel identify Mr. Judd's earlier calculations and spreadsheets (sandwiched among thousands of other pages) that he and BRG prepared for the FAC. (Werderitch Dec. ¶¶2 and 9.)

The absence of any damages analysis in Mr. Judd's Expert Report only added to the Mousa Defendant's bewilderment on this issue. The Mousa Defendants were forced to prepare for trial and Mr. Engel prepared his report based on the limited information available to Mr. Engel, including the limited scope of the Judd Expert Report. (Declaration of Jason A. Engel ("Engel Decl.") ¶¶1-4.)

The Mousa Defendants served Mr. Engel's report. (**Exhibit D** to Werderitch Dec. ¶6.) To prepare his initial report, Mr. Engel compared his analysis of Namco's financial records to the allegations in Plaintiff's FAC. (Engel Dec. at ¶3.) As many of the allegations in the FAC were too vague to perform analysis, Mr. Engel stated various topics upon which he would defer analysis until receipt of Plaintiff's forensic accounting expert report in Mr. Engel's rebuttal report (*e.g.*, amounts of transfers and debts, interest rate, interest accrual, alter-ego, capitalization). (**Exhibit D** to Werderitch Dec. ¶6 at pp. 5, 13; Engel Dec. at ¶3.) Thus, his initial damages analysis

1 is built solely upon, and limited by, his reading of the FAC's general allegations and
2 an effort to distill the thousands of pages of documents produced by Plaintiff and not
3 upon any specific expert calculations or analysis. (Engel Dec. at ¶4.)

4 **F. The Parties Meet and Confer Concerning the Absence of an Expert
5 Damages Analysis from Plaintiff's Initial Designations.**

6 Noting that Plaintiff failed to provide any damages analysis to support the
7 damages allegations in the FAC, through counsel, the Mousa Defendants promptly
8 sent a meet and confer letter to Plaintiff's counsel to confirm the manner in which
9 damages would be proven. (**Exhibit E** to Werderitch Dec. ¶7.)

10 Prior to the conference, on June 10, 2013, the Mousa Defendants received
11 Plaintiff's Revised and Second Supplemental Initial Disclosures, listing Mr. Judd as
12 an expert witness on the topics contained in his report (insolvency and liquidation), as
13 well as a so-called "percipient witness" on the vague subject of "information in the
14 possession of the Trustee." (**Exhibit F** to Werderitch Dec. ¶8 at p. 3.) Thus, the
15 Mousa Defendants were told by Plaintiff's counsel his damages would not be
16 supported by expert testimony, analysis, and/or forensic accounting.

17 On June 17, 2013, counsel for the Mousa Defendants telephonically met and
18 conferred with counsel for Plaintiff regarding Plaintiff's failure to serve an expert
19 report concerning damages. (Werderitch Dec. ¶9.) Counsel for Plaintiff, Elissa
20 Wagner of Pachulski, Stang, Ziehl & Jones, stated that documentary support for
21 Plaintiff's damages is contained on a series of spreadsheets produced by Plaintiff that
22 summarize the book entries in Namco's records. (*Id.*) Ms. Wagner further
23 represented that these spreadsheets were prepared by Mr. Judd and his company, and
24 that Mr. Judd would (somehow) introduce those entries as a "percipient" witness at
25 trial. (**Exhibit G** to Werderitch Dec. ¶9.)

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1 **G. Plaintiff Attempts to Submit an Expert Damages Analysis for the**
2 **First Time in Rebuttal Disclosures.**

3 On June 17, 2013, either because of their omission, or by deliberate stratagem,
4 Plaintiff served David Judd's Rebuttal Expert Report (the "Rebuttal Report") and
5 designated Mr. Judd as rebuttal expert to Jason Engel. (**Exhibits H and I** to
6 Werderitch Dec. ¶¶10 -11.) Specifically, Plaintiff's Rebuttal Designation designates
7 Mr. Judd as Plaintiff's damages expert witness as follows:

8 • "The reports, evidence, opinions and/or testimony provided by the
9 individuals designated as expert by the defendants . . ."
10 • Further, "the subject areas identified in the defendants' expert witness
11 designations or disclosures" including Namco's accounting system and
12 records, balances owed to and from Namco, and the claims, transfers, and
13 "other financial-related allegations at issue in the adversary proceeding"
14 (emphasis added).
15 • The contents of Mr. Judd's Rebuttal Report.

16 (**Exhibit H** to Werderitch Dec. ¶10.)

17 The Rebuttal Report purports to provide, *for the first time*, an expert financial
18 analysis of the real estate deals and transfers alleged in the FAC and a demonstration
19 of the calculations performed to determine the amounts of money and damages
20 sought. (**Exhibit I** to Werderitch Dec. ¶11.) These expert calculations are based upon
21 the same variety of spreadsheets using the same process that Mr. Judd and BRG used
22 for the FAC from Namco's book entries. (*Id.* at pp. 34-77.²)

23 Plaintiff's attempt to introduce his damages analysis on rebuttal deprives the
24 Mousa Defendants, and their expert Mr. Engel, of any fair opportunity to analyze the
25 calculations and respond. (Werderitch Dec. ¶12; Engel Dec. at ¶¶4-8.) It is also
26 directly contradictory to the statements made by Ms. Wagner at the June 17 meet and

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28 ² Additionally, the Rebuttal Report rebuts the initial report of the Mousa Defendants'
expert, Mr. Engel, and co-defendants' expert, Mr. Mowrey.

1 confer that percipient witness testimony would be offered on this topic. Further, it
2 undermines the Mousa Defendants' expert report, rebuttal report, and trial strategy
3 that were based in part, upon Plaintiff's failure to designate a forensic accounting
4 expert on damages. (Werderitch Dec. ¶12.) Great expense has already been invested
5 in the Mousa Defendants' trial defense with limited time until trial. The time
6 remaining needs to be devoted to numerous depositions still to be taken, and trial
7 preparation, not rebutting a rebuttal. The Mousa Defendants' defense is severely
8 prejudiced by both the change in course as well as by their expert's inability to
9 respond. (*Id.*)

10 **H. The Parties Meet and Confer Concerning the Motion.**

11 Given that Plaintiff disclosed a damages analysis for the very first time on
12 rebuttal, the Mousa Defendants' counsel again requested a meet and confer conference
13 concerning a stipulation to limit Mr. Judd's damages testimony to rebuttal only.
14 (Exhibit J to Werderitch Dec. ¶13.) On June 28, 2013, counsel participated in a
15 telephonic meet and confer wherein Plaintiff's counsel declined to stipulate, stating
16 Plaintiff's intention somehow to introduce their forensic accounting expert Mr. Judd's
17 "lay opinion testimony" as to alleged money and damages owed by Defendants during
18 Plaintiff's case-in-chief. (Werderitch Dec. ¶¶13-14; *see also* Exhibit K to Werderitch
19 Dec. ¶14.)

20 It is entirely improper and duplicitous for Plaintiff to take the position that Mr.
21 Judd will testify as a percipient witness on the issue of damages and at the same time
22 include an expert damages analysis in his Rebuttal Expert Report. Thus,
23 notwithstanding the Mousa Defendants' efforts, the parties have been unable to reach
24 a resolution on the issue, necessitating the filing of the accompanying motion to avoid
25 prejudice and uphold Rule 26. (Werderitch Dec. ¶16.)

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I. David Judd Admits at His Deposition There is No Material Distinction Between His Expert and Purported Percipient Witness Opinion.

4 Dilatory and subversive litigation tactics seem to be a commonplace practice for
5 Plaintiff, who has used this same hide-the-ball tactic with David Judd in other actions,
6 springing a Judd analysis on the opposition at the last minute, resulting in exclusion of
7 Mr. Judd's entire opinion in another case arising out of this bankruptcy. (**Exhibit L** to
8 Werderitch Dec. ¶15; RJN ¶7.) Mr. Judd himself admitted there is no distinction
9 between his role as an expert or as a purported "percipient witness." During his recent
10 deposition, Mr. Judd admits:

- Mr. Judd's and BRG's Specialized Knowledge

Q. The fees for which you applied to the court for compensation, those fees related to work you did in your capacity as an accountant, correct?

A. In my capacity as a director of LECG and BRG.

Q. And the expertise that you brought to your work in that capacity for LECG and BRG included your expertise as a CPA specializing in bankruptcy and litigation services and investigative accounting correct?

A. Yes.

(Exhibit M to accompanying Declaration of Bernard M. Resser (“Resser Dec.”) ¶2 at pp. 25:17-26:2.)

- BRG's web address is “www.brg-expert.com,” and describes its work: “Berkeley Research Group, LLC is a leading global expert services and consulting firm that provides independent expert testimony, litigation and regulatory support, authoritative studies, strategic advice, and document and data analytics to major law firms, Fortune 500 corporations.

- government agencies, and regulatory bodies around the world.”
(<http://www.brg-expert.com/about.html>).
- Mr. Judd’s bio states: “David Judd has almost 30 years of experience as a Certified Public Accountant (CPA) specializing in bankruptcy and litigation services and investigative accounting.” (**Exhibit N** to Resser Dec. ¶3; emphasis added.)
- That The FAC and Rebuttal Report Were Prepared By BRG From the Same Source Materials

Q. Okay. In preparing your rebuttal expert report, did you consult any of the schedules that were prepared for the trustee or counsel that were the basis for the damages amounts in the first amended complaint?

A. Yes.

Q. And is that the schedules that you prepared for the damages for the first amended complaint the starting point for your damages analysis in the rebuttal expert report?

A. I don't know that those schedules were the starting point but the underlying support information that was in those binders would have -- would really be the starting point. That and the other books and records of Namco.

(*Id.* at pp. 38:18-39:8.)

Q. Take a look at Exhibit 156 and Exhibit 1 to exhibit -- that exhibit. It's -- Exhibit 1 follows page 30 of the report. What is Exhibit 1 to Exhibit 156?

A. It is a schedule of the documents that I looked at in preparing this report.

Q. Is this list -- does this list include data and information relied on by the trustee for the allegations made in the first amended complaint?

A. Yes.

(*Id.* at pp. 42:22-43:6; *see also id.* at pp. 53:23-54:4, 107:8-17 (same categories of documents reviewed to prepare Rebuttal Report as to prepare analysis for FAC).

- The FAC Damages Were Calculated By the Same Process As the Rebuttal Report Damages Analysis

Q. The process itself, in terms of gathering information from the documents that are in the binders and from Namco's books and records, that process that you used to prepare the schedules is the same process that you used to prepare the rebuttal report, correct?

A. The process was pretty much the same, yes.

(*Id.* at pp. 40:18-41:2.)

- Mr. Judd's and BRG's Expert Engagement Is the Same as That Approved by the Court

Q. The documents that memorialize, refer or relate to the compensation that you received or expect to receive in connection with your rendering of services as a consultant or an expert in this litigation, are those contained in applications that have been made to the court?

A. Yes.

(*Id.* at pp. 53:23-54:4.)

- That the Expert Rebuttal Is the Most Up-to-Date, Definitive Damages Calculation of the Categories Outlined in the FAC

Specifically, Mr. Judd testified:

- Rebuttal Report contains definitive damages alleged concerning Namco 8, LLC (**Exhibit M** to Resser Dec. ¶2 at pp. 45:4-13).
- Rebuttal Report contains definitive damages alleged concerning DGADE of Delaware, LLC (**Exhibit M** to Resser Dec. ¶2 at pp. 46:11-15).

- 1 ○ Rebuttal Report contains definitive damages alleged concerning
- 2 Security Pacific Bancorp (**Exhibit M** to Resser Dec. ¶2 at pp.
- 3 47:3-7).
- 4 ○ Rebuttal Report contains definitive damages alleged concerning
- 5 Wilshire Bundy Ground Lease (**Exhibit M** to Resser Dec. ¶2 at pp.
- 6 47:8-14).

7 In summary, Mr. Judd's testimony establishes that no material distinction exists
8 between his and BRG's expert opinion on money and damages allegedly owed and the
9 purported "percipient witness" testimony Plaintiff now attempts to introduce.

10 **III. AS A REBUTTAL EXPERT WITNESS, MR. JUDD'S DAMAGES**

11 **TESTIMONY SHOULD BE EXCLUDED FROM PLAINTIFF'S CASE-
12 IN-CHIEF**

13 **A. Mr. Judd's and BRG's Lay Opinion Must Be Excluded Because It
14 Is Based On Specialized Knowledge and Therefore Triggers the
15 Requirements of FRCP 26(a)(2)(B).**

16 During the meet and confer process, Plaintiff proffered an explanation for their
17 failure to submit the Rebuttal Report as an initial disclosure that would have afforded
18 the Mousa Defendants the opportunity for rebuttal prior to trial. (**Exhibit J** to
19 Werderitch Dec. ¶13.) Plaintiff now contends David Judd offers both an expert
20 opinion and a "lay opinion" on the damages analysis contained in the one Rebuttal
21 Report. (*Id.*) This after-the-fact "explanation" is either a fiction concocted to conceal
22 Plaintiff's omission or a deliberate use of misdirection in flagrant disregard for the
23 Federal Rules of Civil Procedure.

24 Mr. Judd and BRG are not percipient witnesses. Lay opinions are limited to the
25 witnesses' "perception," *i.e.*, "events perceived through physical senses or when
26 testifying about opinions rationally based on personal observation." *De La Torre v.*
27 *Merck Enters., Inc.*, 540 F.Supp.2d 1066, 1075 (D. Az. 2008). Mr. Judd's and BRG's
28 specialized forensic accounting analysis of Namco's voluminous books cannot

1 possibly be characterized as mere “personal observation.” In fact, opinion testimony
2 regarding information obtained from outside personal knowledge (for example,
3 Namco’s extensive books and records) triggers the requirements of Fed. R. Civ. Proc.
4 26(a)(2)(B). *Matsuura v. E.I. du Pont De Nemours and Co.*, 2007 WL 433115 at *3-4
5 (D. Ha. Feb. 2, 2007); *see also Britz Fertilizers, Inc. v. Bayer Corp.*, 2009 WL
6 1748775 at *3 (E.D. Cal. Jun. 17, 2009) (“expert testimony is generally testimony that
7 a witness prepares using an analysis based on specialized knowledge”).

8 Indeed, the uncertainty of the books and records in this case has already been
9 acknowledged by this Court, and this Court already ruled that BRG is not qualified as
10 a percipient witness regarding Namco’s business records. (RJN ¶6.)

11 Moreover, the “adjustments” made by Mr. Judd to Namco’s books and records
12 require accounting expertise.

13 It is clear that Plaintiff retained Mr. Judd for his expertise in forensic
14 accounting and financial analysis, designating Mr. Judd as an expert in both Rule 26
15 and expert disclosures and relying on the Rebuttal Report and BRG’s spreadsheets to
16 compute its alleged damages and claims for money. (*See also Exhibits C and I* to
17 Werderitch Dec. ¶¶5 and 11 at p. 2; RJN ¶¶3, 5; **Exhibit N** to Resser Dec. ¶3.³)

18 Indeed, Mr. Judd is in a position to testify only because of his forensic
19 accounting expertise and specialized knowledge. Therefore, his opinion is that of an
20 expert and not a percipient witness.

21 **B. Mr. Judd’s and BRG’s Damages Testimony Should Be Limited to**
22 **Rebuttal.**

23 Rebuttal reports and witnesses are utilized “solely to contradict or rebut the
24 evidence of a witness identified by another party.” *Lindner v. Meadow Gold Dairies,*
25 *Inc.*, 249 F.R.D. 625, 636 (D. Ha. 2008); Fed. R. Civ. Proc. 26(a)(2)(D)(ii). In fact,
26 courts can properly reject attempts to use a rebuttal report as a vehicle to make up for
27 testimony that should have been presented through the initial reports as is threatened

28³ The Namco Estate has incurred millions in fees with LECG and BRG as experts.

1 here. *See, e.g., Exxon Corp. v. Halcon Shipping Co.*, 156 F.R.D. 586, 586-88 (D.N.J.
2 1994) (where “rebuttal” was actually “of a direct nature” to a “central factual issue” in
3 the case, the court held that the expert should have been disclosed and a report
4 produced within the time provided for initial reports).

5 Here, the Rebuttal Report is a damages analysis purportedly submitted to
6 “rebut” the analysis of the Mousa Defendants’ expert, Mr. Engel. (Exhibits **H** and **I**
7 to Werderitch Dec. ¶¶10-11.) However, the Rebuttal Report goes far beyond mere
8 rebuttal of Mr. Engel’s report. It provides a comprehensive outline of Plaintiff’s
9 damages and claims for money, and an updated analysis by Mr. Judd of those
10 damages he calculated for the FAC. As such, pursuant to applicable law, the damages
11 analysis prepared by Mr. Judd and/or his company, BRG, should be limited to rebuttal
12 testimony and limited in scope only to opinions expressed by Mr. Engel and excluded
13 from Plaintiff’s case-in-chief. *See Goodman v. Staples The Office Superstore, LLC*
14 (9th Cir. 2011) 644 F.3d 817, 826-27 (affirming exclusion of rebuttal expert witnesses
15 during plaintiff’s case-in-chief), and *Lindner, supra*, 249 F.R.D. at 636 (testimony of
16 rebuttal experts is limited such that, at trial, rebuttal expert cannot testify in a
17 plaintiff’s case-in-chief, and cannot testify unless and until the defendant’s experts
18 testify as to the opinions for which the rebuttal experts have been designated); *see also*
19 *Bowman v. General Motors Corp.*, 427 F.Supp. 234, 241 (D.C. Pa. 1977) (“there is
20 unanimous agreement that on rebuttal it is properly within the discretion of the trial
21 judge to limit testimony to that which is precisely directed to rebutting new matter or
22 new theories presented by the defendant’s case-in-chief”); *Johnson v. Grays Harbor*
23 *Community Hosp.*, 2007 WL 4510313 at *2-3 (W.D. Wash. Dec. 18, 2007) (granting
24 motion to strike non-rebuttal testimony from designated rebuttal witnesses); *Int’l Bus.*
25 *Machines Corp. v. Fasco Indus., Inc.*, 1995 WL 115421 at *6 (N.D. Cal. Mar. 15,
26 1995) (rebuttal experts testimony to be restricted to attacking the adversary’s experts);
27 *AZ Holding, L.L.C. v. Frederick*, 2009 WL 2432745 at *6 (D. Ariz. Aug. 10, 2009)
28 (designated rebuttal expert “may only offer testimony to contradict or rebut” the

1 testimony of the adversary's expert on the same subject matter); *Donell v. Fidelity*
2 *Nat. Title Agency of Nev.*, 2012 WL 170990 at *4 (D. Nev. Jan. 20., 2012) citing
3 *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006) (rebuttal
4 evidence may be introduced to challenge the evidence or theory of an opponent, but
5 may not be used to establish a case-in-chief).

6 These cases demonstrate that the stratagem employed by Plaintiff has been
7 previously attempted – and failed – in costly litigation. The cases also show the
8 proper remedy: exclusion from case-in-chief and limitation in scope to actual rebuttal.

9 **IV. THE MOUSA DEFENDANTS WILL INCUR SUBSTANTIAL**
10 **PREJUDICE IF MR. JUDD'S AND BRG'S DAMAGES TESTIMONY IS**
11 **NOT LIMITED AS REQUESTED**

12 As noted above, Plaintiff did not submit an expert damages analysis with its
13 initial reports due on May 17, 2013. (Werderitch Dec. ¶3.) Plaintiff may have
14 overlooked his desire for expert testimony on an essential element of each of the
15 causes of action in the FAC. But Plaintiff may not fix that mistake on rebuttal
16 because rebuttal reports are not proper vehicles for missing analysis. *See Step-Saver*
17 *Data Sys., Inc. v. Wyse Technology*, 752 F. Supp. 181, 193 (E.D. Pa. 1990)
18 (explaining that rebuttal is not “an opportunity for the correction of any oversights in
19 the plaintiff's case-in-chief”), rev'd on other grounds by 939 F.2d 91, 107 (3d Cir.
20 1991), and quoted for this proposition in *Crowley v. Chait*, 322 F. Supp. 2d 530, 551
21 (D.N.J. 2004).

22 Indeed, “It is well settled that evidence which properly belongs in the case-in-
23 chief but is first introduced in rebuttal may be rejected, so as to avoid prejudice to the
24 defendant and to ensure the orderly presentation of proof.” *Emerick v. U.S. Suzuki*
25 *Motor Corp.*, 750 F.2d 19, 22 (3d Cir. 1984). The burden to prove harmlessness from
26 the delayed designation lies with Plaintiff. *See Goodman, supra*, 644 F.3d at 827.
27 Plaintiff cannot make such showing. Here, the Mousa Defendants are unduly
28 prejudiced by Plaintiff's failure to introduce its damages analysis until rebuttal:

- 1 • The vague allegations in the FAC are insufficient to put the Mousa
2 Defendants on notice of the exact damages claimed and calculated;
- 3 • Throughout the months of documents discovery, the hundreds of
4 thousands of pages of documents that Plaintiff produced did not make
5 any clearer how the damages were calculated;
- 6 • The Mousa Defendants relied on Plaintiff's initial disclosures which
7 included no damages expert in and instructed their expert and prepared
8 their defense for trial accordingly.
- 9 • As such, Mr. Engel's initial damages analysis is limited by and is built
10 solely upon his reading of the FAC's general allegations and what he
11 could glean from the documents, and not upon any specific expert
12 calculations or analysis.
- 13 • Plaintiff continually represented to the Mousa Defendants that its
14 damages would be proven through percipient testimony, a position
15 consistent with their Rule 26 Supplemental Disclosures.
- 16 • Then, in flagrant disregard for the Federal Rules governing expert
17 disclosures, Plaintiff produced a comprehensive expert damages analysis
18 for the very first time on expert rebuttal.
- 19 • Mr. Engel now has no opportunity to perform a true analysis of damages
20 based upon Mr. Judd's calculations or to rebut them.

21 As noted above, the Mousa Defendants have already incurred extraordinary
22 expense resulting from this litigation. Plaintiff has spent millions on these experts and
23 now wants to use them as "percipient witnesses" and be exempt from the Federal
24 Rules requiring disclosure. Great amounts of time and strategy are already invested in
25 the Mousa Defendants' trial defense. On the eve of discovery cutoff, and the time for
26 expert designations having lapsed, their defense is severely undermined by Plaintiff's
27 omission to timely designate an expert on damages and money allegedly due from
28 Defendants, as well as Jason Engel's inability to respond to the delayed disclosure.

1 **V. CONCLUSION**

2 For the foregoing reasons, David Judd's and Berkeley Research Group's expert
3 testimony expert testimony on Plaintiff's damages should be limited to rebuttal, and
4 their percipient testimony regarding damages excluded entirely during Plaintiff's case-
5 in-chief.

6 DATED: July 22, 2013

7 GREENBEG GLUSKER FIELDS
8 CLAMAN & MACHTINGER, LLP

9 By: /s/ Brian L. Davidoff.

10 ~~BRIAN L. DAVIDOFF~~

11 BERNARD M. RESSER

12 LORI L. WERDERITCH

13 Attorneys for Defendants Mousa Namvar,
14 Magdiel, LLC, DGADE of Delaware, LLC,
15 Namco 8, LLC, Bunherst, LLC, and
16 Wishlab 90, LLC

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am over the age of 18 and not a party to the within action; I am employed by
4 GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP in the
County of Los Angeles at 1900 Avenue of the Stars, 21st Floor, Los Angeles,
California 90067.

5 On July 22, 2013, I served the foregoing document(s) described as:

6 **NOTICE OF MOTION AND MOTION FOR AN ORDER:**

7 **(A) LIMITING DAVID JUDD AND BERKELEY RESEARCH GROUP'S
TESTIMONY ON THE MONETARY CLAIMS AND DAMAGES ALLEGED
BY PLAINTIFF BRADLEY D. SHARP, CHAPTER 11 TRUSTEE OF NAMCO
CAPITAL GROUP, INC TO REBUTTAL EXPERT TESTIMONY LIMITED
IN SCOPE TO THE TESTIMONY ACTUALLY GIVEN AT TRIAL BY THE
MOUSA DEFENDANTS' FORENSIC ACCOUNTING EXPERT; AND**

8 **(B) EXCLUDING BOTH EXPERT AND PURPORTED PERCIPIENT
WITNESS TESTIMONY FROM MR. JUDD AND BERKELEY RESEARCH
GROUP ON THE MONETARY CLAIMS AND DAMAGES ALLEGED BY
PLAINTIFF DURING PLAINTIFF'S CASE-IN-CHIEF**

9 **BY DEFENDANTS MOUSA NAMVAR, MAGDIEL, LLC, NAMCO 8, LLC,
WISHLAB 90, LLC, BUNHERST, LLC, AND DGADE OF DELAWARE, LLC;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

10

11 By placing the true copies thereof enclosed in sealed envelopes addressed
12 as stated below.

13 **(BY MAIL)** I placed said envelope(s) for collection and mailing, following
14 ordinary business practices, at the business offices of GREENBERG
15 GLUSKER FIELDS CLAMAN & MACHTINGER, LLP, and addressed as
16 shown on the attached service list, for deposit in the United States Postal
17 Service. I am readily familiar with the firm's practice for collection and
18 processing correspondence for mailing with the United States Postal Service,
19 and said envelope(s) will be deposited with the United States Postal Service on
20 said date in the ordinary course of business.

21 **(BY OVERNIGHT DELIVERY).** On July 22, 2013, I caused said
22 document(s) to be placed in a Norco Overnite envelope and taken to the Norco
23 Overnite Drop Box located at 1900 Avenue of the Stars, Los Angeles,
California 90067 for delivery to the parties listed on the attached service list:

24 **VIA NORCO OVERNITE**
25 Honorable Gary A. Feess
United States District Court
26 255 East Temple Street, Courtroom 740
Los Angeles, California 90012

1 **(BY ELECTRONIC SERVICE)** by causing the foregoing document(s) to be
2 electronically filed using the Court's Electronic Filing System which constitutes
3 service of the filed document(s) on the individual(s) listed on the attached
4 mailing list.

5 Alan J Kornfeld: akornfeld@pszyj.com
6 Elissa Wagner: ewagner@pszyj.com
7 Genise R. Reiter: grr@srblaw.com
8 Alan Frank Broidy: fbroidy@ix.netcom.com
9 Robert B Mobasseri: Robert@lawyer.com
10 Brian Leslie Davidoff: BDavidoff@GreenbergGlusker.com;
11 jreinglass@greenbergglusker.com; kwoodson@greenbergglusker.
12 Lori L Werderitch LWerderitch@GreenbergGlusker.com,
13 Office of the U.S. Trustee: ustpregion16.la.ecf@usdoj.gov

14 (Federal) I declare that I am employed in the office of a member of the
15 bar of this court at whose direction the service was made. I declare under
16 penalty of perjury that the above is true and correct.

17 Executed on July 22, 2013 at Los Angeles, California.

18 /s/ Jan Reinglass
19 JAN REINGLASS

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